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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.

MOSES LASKY
RICHARD HAAS
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900
Attorneys for Petitioner Union Oil Company of California

GEORGE A. CUMMING, JR.
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900
Of counsel for Petitioner Union Oil Company of California

RICHARD W. CURTIS
1801 Avenue of the Stars
Los Angeles, Calif. 90067
Telephone: (213) 553-3800
Attorney for Petitioner Industrial Asphalt, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

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Two unrelated lines of argument run through Copp's (Respondents') brief,[1] and, although unrelated, they are not kept separate. The first is that sellers of asphaltic concrete, although wholly local, and sales of that substance, also wholly local, for use locally, are nevertheless "*in* commerce" because the substance is used in making or repairing roads. This is the reasoning of the court below. The second is not advanced by that court but is

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All emphasis in quotations in this brief has been added unless otherwise noted.

1. Hereinafter cited as "Resp. Br." Petitioners' opening brief will be referred to as "O.B."

urged by Copp, perhaps in apprehension that the reasoning below is untenable. It is that the provisions of the Robinson-Patman and Clayton Acts, despite the plain limitation of their language, should be read as if Congress has exercised all its constitutional power, as has been said of the Sherman Act, and therefore should be read as if their only jurisdictional requirement is that there be an *effect* on interstate or foreign commerce although neither party nor activity is "in commerce".

In their discussion of the specific statutes (Parts II through V of Resp. Br.) the reasoning of the court below is hardly more than alluded to; the bulk of the argument is devoted to the second line of reasoning.

Before answering Copp's argument, we observe that Copp does not dispute any of the facts set forth in our opening brief or add any new, true and relevant fact. There are some unwarranted but irrelevant innuendoes upon which we shall comment at appropriate places in the argument below. There is the incorrect assertion (Resp. Br. 11, 12) that petitioners stipulated that the allegations of the complaint about "effect" on interstate commerce were admitted for purposes of the motions for summary judgment. The incorrectness of that assertion is shown by the very record (13 R. 306) cited to support it.[2] As noted in our opening brief, the district court directed Copp to point to evidence of jurisdiction after it had completed its discovery, and the court, discharging its duty and exercising its power to find the facts bearing on jurisdiction, then *found* that there was no evidence of any effect on interstate commerce (See O.B. pp. 7, 8, 39, 40). The court below did *not* reverse that finding of fact, holding, instead, that there was "effect" as a matter of law. We do not discuss this matter further, because this Court has not brought before it the Sherman Act

2. The district court then stated the question as one left for it to decide (Pet. App. A, p. 3):

> "The question—Did defendants' local activities substantially affect commerce—remains."

issue where the controlling fact is "effect", and on the Robinson-Patman and Clayton Act issues the questions are whether more than effect is not required for jurisdiction.

ARGUMENT

I. The Use of Asphaltic Concrete in Roads Does Not Place the Seller or the Sale "in Commerce".

The term "interstate highway" is not a term of art. It was used in this case to signify roads for which federal financial aid is given to the States under the Federal-Aid Highway Act, 23 U.S.C. §§ 101, et seq. (72 Stat. 885, as amended). Such was the sense in which the term was used in the pleadings and in the stipulation on the subject (Appendix, pp. 17, 18, 27, 28, 181), and it is the sense in which Copp's brief uses it (e.g., Resp. Br. 2, fn. 2).

That very fact demonstrates the meaninglessness of the concept for this case. What the Federal-Aid Highway Act provides is for grants of money to the States to aid them in constructing roads. That aid is not confined to major routes. There are various classifications of roads, and the financial grant ranges down from 90% of the cost, depending on the classification. Federal aid is given to numerous things, such as forest roads and trails; to roads, streets and parkways within a state constituting a system of connected highways (Section 103(b)); to farm-to-market roads, local rural roads, county and township roads (Section 103(c)), as well as to an interstate system comprised of roads and streets so selected as to connect principal centers by routes as direct as possible (Section 103(d)). City streets are part of the interstate system. Thus Copp states (Resp. Br. 24, fn. 6) that Industrial and Sully-Miller must comply with a certain Executive Order "in order to perform work on *county* roads funded under the Federal Aid Highway Act."

The classification for which states receive the largest percentage of cost is the "interstate highway system". But roads in this classification are merely state roads one end of which connects at a state line with a road of another state in the most direct route between major cities. Included in the interstate highway system are "connectors" within a state. For example, the whole of Interstate 480 lies in San Francisco between the intersection of Broadway and Sansome Streets and the intersection of First and Harrison Streets. "Interstate 80" does not traverse Nevada; there are only disconnected stretches so labeled, alternating with stretches labeled "40" and not part of the interstate system.

The nature of federal highway aid and of what is aided is summed up in the regulations of the Secretary of Transportation, particularly 23 C.F.R. § 1.6(a) and (c), containing the following:

> "(a) *Selection or designation.* * * * systems of Federal-aid highways are selected or designated by any State that desires to avail itself through its State highway department, of the benefits of Federal aid for highways. Upon approval by the Administrator of the selections or designations by a State highway department, such highways shall become portions of the respective Federal-aid highway systems, and all Federal-aid apportionments shall be expended thereon.
>
> * * *
>
> (c) *Selection considerations.* Each Federal-aid system shall be so selected or designated as to promote the general welfare and the national and civil defense and to become the pattern for a long-range program of highway development to serve the major classes of highway traffic broadly identified as (1) interstate or interregional; (2) *city-to-city primary,* either interstate *or intrastate;* (3) *rural secondary or farm-to-market;* and (4) *intraurban.* The conservation and development of natural resources, the advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system."

State highways in California are designated by state statute (Cal. Streets and Highways Code, §§ 300, et seq.) and these designations are retained after federal aid.

Congress has *not* sought by the Federal-Aid Highway Act to regulate highways or the operations of those working on or supplying materials for use in highways, and it has not done so. What the Act does is to offer money to the States. It declares the conditions which must be met before money will be given, but a State willing to forego the gift can ignore the conditions. And no condition stated by Congress in the Act, including those referred to by Copp (Resp. Br. 24, 25), has any connection whatever with the Robinson-Patman Act or Sections 3 or 7 of the Clayton Act.[3]

Copp calls attention to the provision of Section 112(c) of 23 U.S.C. that in granting aid the Secretary of Transportation shall require as a condition precedent to his approval of contracts for construction of roads awarded by competitive bidding a sworn statement that the party to whom the contract is awarded has not "taken any action in restraint of free competitive bidding in connection with such contract." Instead of aiding Copp's case, this undermines it. If the fact that one constructing roads or supplying material to be used in their construction puts him and his activities "in commerce", then the whole body of federal antitrust regulation would automatically apply without more; the narrow regulation against restraint of competitive bidding in respect of the contract would already have been included

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3. The statement at Resp. Br. 14 that petitioners conceded "that the interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to control and authority of the federal government" is not true. What was admitted is just what is stated above.

as a small part of the whole body of regulation, and it would have been unnecessary to enact Section 112(c) to impose but a small piece of the whole as a condition of federal aid.

Highway Statistics 1971, a publication of the U.S. Department of Transportation and the Federal Highway Administration,[4] notes that the federal-aid highway program is a "grant-in-aid type of program" (p. 93), and that numerous federal agencies share in federal-aid highway programs, including the Forest Service of the Department of Agriculture, the National Park Service, and the Department of Defense (p. 1). It states (p. 11) that:

> "Under the federal-aid highway program, initiative for selecting routes eligible for improvement with Federal-aid funds rests with the States, and these routes continue to remain under the jurisdiction of the States or local governments which are responsible for administering and maintaining them as part of the State or local highway systems."

And (pp. 185, 186):

> "Except for minor amounts of highway mileage, primarily in Federal parks and installations, practically all of the roads and streets in the United States are under the jurisdiction of the States and local governments. The Federal-aid systems are, basically, segments of State and local mileage eligible for Federal Aid. All highways in the Federal-aid systems are selected by the State and local governments, subject to the approval of the Federal Highway Administration."

There is no reason to suppose that the constitutional basis of the Federal-Aid Highway Act is the power to regulate commerce. Its provisions relate to military defense, national parks and forests, and the general welfare of the nation, and thus probably are supported by several provisions of the Constitution, primarily the "General Welfare" clause of Art. I, Sec. 8, Cl. 1 (*United States v. Butler*, 297 U.S. 1 (1936)). Whether the constitutional powers of Congress are such that it could impose its will on everything in any way connected with roads and road building is not a question in this case. Congress has not sought to do so.

4. U.S. Government Printing Office, Stock Number 5001-00047.

The Federal-Aid Highway Act offers no assistance at all in deciding the present case, nor did the court below suggest that it did. The fact of federal aid has no bearing on whether seller or sales are "in commerce". The only fact to be examined is the one on which the court below relied, viz., the fact that roads link up, one with another, and eventually a road crosses a state line. It is meaningless to the term "in commerce" whether a road is an "arterial," a "connector," a city street, or a farm-to-market road. There can be no logical division, whereby the reasoning of the court below applies to one kind of road and not another. That is why we said in our opening brief (p. 33):

> "Every street in every city, and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road 'in commerce'? By that reasoning, the local society for care of the blind, selling their brooms to the street sweeper, or the street cleaner itself, or the little tow truck operator removing illegally parked cars from obstructing the street, all these are engaged 'in commerce'."

On May 31, 1974, in a decision not reported until after our opening brief was filed, the Fifth Circuit in *Scranton Construction Co. v. Litton Industries*, 494 F.2d 778, rejected the contention that the Robinson-Patman Act applies to local sales of readymix concrete used in the construction of a "shipyard, a massive instrumentality of interstate and foreign commerce" (p. 781), held that the lack of any sale crossing a state line is fatal, and then, *addressing itself to the very decision of the court below in the present case, said* (p. 781):

> "And though we recognize that the Supreme Court has granted certiorari in a second-line injury case where our Brethren of the Ninth Circuit have dispensed with the requirement of interstate sale on the ground that sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved, and that thus a new deliverance in this area may soon come, we are not disposed to depart from our recent decision, supported by well-nigh universal precedent, that interstate sales must be involved for jurisdiction to attach under these acts."

The English language contains a body of terms, each of separate meaning and having an ascending order of reach, viz., "in commerce", "production of goods for commerce," production of or working on "instrumentalities of commerce," and "affecting commerce". They comprise an armory from which Congress can select the tool to achieve a particular purpose. To treat all these terms as synonymous is to corrupt language, and thereby the law, and thus to impoverish Congress. Yet that is what Copp asks the Court to do.

II. The Clayton and Robinson-Patman Acts, Unlike the Sherman Act, Do Not Exercise All the Power of Congress. More Is Required for Their Jurisdiction to Attach Than That Interstate Commerce Be Affected.

Copp's arguments about the specific statutes involved in this case do no more than note the rationale of the court below (e.g., Resp. Br. 36) and then pass on to urge and argue that the several acts are like the Sherman Act in requiring no more than an effect on interstate commerce.[5]

5. The questions on which the Court granted the writ present the Robinson-Patman Act, Section 3 of the Clayton Act, and Section 7 of the Clayton Act in that order, and they were discussed in that order in petitioners' opening brief. Our reply will follow the same order although respondents discuss them in reverse.

A. THERE WAS NO JURISDICTION OF THE ROBINSON-PATMAN CLAIM OF PRICE DISCRIMINATION.

Industrial makes asphaltic concrete entirely in California from California materials and sells it entirely in California, as does Copp.[6]

Copp's primary argument and its grand submission about Robinson-Patman (Resp. Br. 44) is that it, like the Sherman Act, must be construed as exercising all the powers the Constitution would allow Congress to exercise despite the plain limiting language of the statute. The thread of the argument is elusive.

Copp first asserts that the definition of "commerce" in the Robinson-Patman Act is the same as in Section 1 of the Clayton Act (Resp. Br. 36, 37) and in the Sherman Act (Resp. Br. 26). But that definition is merely shorthand that "commerce" means commerce between the states and with foreign countries. There is no issue in this case about the definition. Copp argues that decisions of this Court have expanded the meaning of "commerce". Any such expansion has been in respects not relevant here. There

6. Copp asserts (Resp. Br. 4) that Industrial "manufactures asphaltic concrete at fifty-five hot plants located in Arizona, California and Nevada . . . ." But 53 were in California and all 53 made and sold asphaltic concrete solely in California. There was 1 plant in Arizona, which made and sold asphaltic concrete solely in Arizona and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Phoenix area of Arizona. Similarly, the 1 plant in Nevada made and sold asphaltic concrete solely in Nevada and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Las Vegas area of Nevada (App. 117, and 2 R. 476, 477). The large number of plants shows how local the business is.

Copp also asserts that asphaltic concrete is made "from liquid asphalt produced from substantial quantities of foreign and interstate oil" (Resp. Br. 4). There is nothing to support the use of the adjective "substantial". It is a matter of judicial notice that asphalt is a product of the refining of crude oil, chiefly heavy crudes, and that heavy crudes are the typical California crude oil. Moreover, the source of the crude oil from which California refineries derive the asphalt which hot plant operators purchased to compound into asphaltic concrete is irrelevant. As noted at O.B. 6, asphaltic concrete is compounded of 95% rock, sand and aggregates and 5% liquid asphalt.

is no question here about when goods "come to rest"; no asphaltic concrete ever came from without a state or was destined to depart from a state. There is no question here about whether an activity is commerce or some other form of human activity, as was once held about insurance (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)) and is still held about baseball (*Flood v. Kuhn*, 407 U.S. 258 (1972)). The decisions of the Court to which Copp really refers are not decisions expanding the meaning of "commerce" but expanding the reach of the constitutional grant of power to regulate commerce so as to permit regulation of what affects commerce even though the cause and the causers are not "in commerce". What Congress can do is different from what it does do. And in Robinson-Patman it has not chosen to regulate as broadly as perhaps it might.

The issue here concerns the requirement of the Robinson-Patman Act that the person making a discriminatory sale must be "engaged in commerce", that his conduct must be "in the course of such commerce", and that "either or any of the purchases" be "in commerce".

Copp argues (Resp. Br. 40) that the Act was written in terms narrower than the constitutional reach because "The *Schechter* case[7] was decided only two weeks before Representative Patman introduced his original bill" and that but for constitutional doubts raised by *Schechter* the Act would have been broader. This is pointless for a number of reasons. Where a statute is written in terms expressing regulation to the furthest reach of constitutional power, in the most comprehensive possible language, the reach of the statute will keep step with current views of the reach of the power. But where a statute is written with explicit restriction on its reach, courts cannot expunge those restrictions upon an assumption that Congress would have done so had it thought

7. *Schechter Bros. Poultry Co. v. United States*, 295 U.S. 495 (1935).

that it could. The Robinson-Patman Act has been on the books for nearly 40 years, with uniform interpretation, and Congress has not seen fit to rewrite it. Moreover, Congressman Patman has had no doubt of what his bill meant. In W. Patman, *Complete Guide to the Robinson-Patman Act* (Prentice-Hall, 1963), pp. 46-47, he wrote:

> "In those situations in which a person, partnership or corporation has been found to be engaged in commerce, discriminations practiced by him are not subject to the Robinson-Patman Act unless *some* of the different prices charged by him involve sales and shipments of goods across state lines. In other words, subsection 2(a) does not prohibit price discriminations which merely *affect* commerce. Some transactions must be *in* commerce, and not merely those which *affect* interstate commerce, since the Robinson-Patman Act only prohibits discriminations in price made in the course of commerce—that is, interstate commerce." [emphasis in original].

Furthermore, it is rankest speculation that the limitations of Robinson-Patman stemmed from apprehension about the scope of power as stated in the *Schechter* case. If it had been, and if constitutional doubts rather than "policy misgivings as to the wisdom of federal interventions in areas previously regulated by the states" (86 Harvard Law Rev. 765, 771) were the cause of the narrower scope of the Act, Congress would have pushed to the limits allowed by *Schechter* by tracking Schechter's language so as to prohibit discriminations "in or directly affecting commerce". In that way the reach of the Act would have accorded at any given time with judicial views of what directly affects commerce. Instead, Congress chose to impose the requirements that both the sale and the seller be "in commerce".

The requirement of "in commerce" was taken, not from *Schechter*, but from Section 2 of the Clayton Act enacted in

1914 (38 Stat. 730) and is the same as the requirement in Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1) and (b), also enacted in 1914 (38 Stat. 719). In *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941) (discussed O.B. pp. 25, 26, 37 and 38) the Court, interpreting this very language in the Federal Trade Commission Act, declined to interpret it more broadly than it reads. Possibly to escape the force of *Bunte* decided in 1941, Copp asserts that the change in the Court's outlook about the scope of the commerce clause of the Constitution came with *Wickard v. Filburn*, 317 U.S. 111, in 1942 (Resp. Br. 22). On the contrary, it was in *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937) that the Court advanced from the outlook of the *Schechter* case, and the fundamentals of *Jones & Laughlin* were reaffirmed in *United States v. Darby*, 312 U.S. 100 (1941), which cites *Jones & Laughlin* (at p. 119) and in turn is cited in *Wickard v. Filburn*, 317 U.S. at p. 118. The *Bunte* case was decided just 14 days after *Darby* and thus plainly puts the quietus on the argument that the several acts imposing the requirement of "in commerce" are to be read as if they merely required an effect on commerce. Even after *Darby*, which showed that Congress could have gone farther than it did, the narrower question of what Congress had actually done in particular enactments continued to occupy the attention of the Court. *E.g., Kirschbaum v. Walling*, 316 U.S. 517 (1942); *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Alstate Const. Co. v. Durkin*, 345 U.S. 13 (1953); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959). The Court's opinion in the latter case begins with this observation (358 U.S. at 211):

> "We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce', indicated its intent not to make the scope of the Act co-extensive with its power to regulate commerce."

And by amendments in 1961 and 1966 Congress chose to exercise more of its power over wages and working conditions. (See fn. 10, O.B. 20).

Copp argues that the Robinson-Patman Act was intended to expand the provisions of Section 2 of the Clayton Act against discrimination. It did so, but in no respect relevant here. It had been held that Section 2 required both sales between which there was discrimination to be "in commerce". Robinson-Patman expanded the Act by requiring only one of the sales to be "in commerce," by the provision "when either or any of the purchases involved in such discrimination are in commerce". But the very fact that Robinson-Patman retained the requirement of "either or any" while eliminating the necessity that both be in commerce underscores the deliberate intention of Congress that *at least one of the sales* must be "in commerce". Until the decision below, all courts have held that this provision requires that at least one of the sales cross a state line. And, as just noted, the Fifth Circuit in *Scranton Construction Co., Inc. v. Litton Industries Leas. Corp.*, 494 F.2d 778 (1974), reasserted that requirement. It noted that in its decision here the court below had sought to distinguish prior decisions of the Fifth Circuit "on the ground that we were not there required to consider such a nexus," i.e., that "sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved," and it nevertheless rejected the decision of the court below.[8]

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8. Copp cites an earlier decision of the same court, *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, cert. den. 379 U.S. 900 (1964). It obviously is limited to a Sherman Act situation and was not considered by the court that decided it to apply to Robinson-Patman and Clayton Act matters, as shown, not only by *Scranton*, but also by *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972). We discussed the *Ft. Lauderdale* case in our petition for certiorari, but did not refer to it again in our opening brief since the writ was not granted with respect to the Sherman Act issue.

Copp's attempt to rewrite the Robinson-Patman Act by reference to "legislative history" must fail. Copp's argument was borrowed by it, without attribution, from a note by a second-year law student in 22 Hastings Law Journal 1225 (1971) and is answered by a note in 86 Harvard Law Review 765 (1973). The latter, characterizing the legislative history as "unrevealing," states (p. 772):

> "Against the background of such an unrevealing legislative history, the canon of statutory interpretation generally applied by the Supreme Court would seem to require adherence to the literal language of the statute."

In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 767 (7 Cir. 1973), *cert. den.*, 414 U.S. 1146, rehearing denied, ... U.S. ....., 41 L.Ed.2d 1149 (1974), the Tenth Circuit quotes the following passage from p. 769 of the same Harvard Law Review note approvingly:

> "Nor does the complicated legislative history of the jurisdictional provisions of the Act lend much support to *Littlejohn's*[9] disregard of the statutory language. The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusally difficult to decipher."

Copp's citation of *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954) and his criticism of lower courts' uniform interpretation of that case (Resp. Br. 22, 37, 38) are an irrelevant digression. In *Moore*, the defendant did sell its product across state lines, and there was discrimination in price between the local sales which injured the plaintiff and the interstate sales. The Court noted (348 U.S. at 118):

9. The *Littlejohn* decision here referred to was a decision of a panel of the Fifth Circuit which that court later set aside *en banc* in *Littlejohn v. Shell Oil Company*, 483 F.2d 1140, *cert. den.*, 414 U.S. 1116 (1973).

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such commerce, it made price discriminations, maintaining the price in *interstate* transactions while cutting the price in the *intrastate* sales." (Emphasis in original)

Whether, under *Moore*, it is enough that the profits from interstate sales offset losses from local sales or whether, as held in the *Mayer* and other cases, there must be some competitive relationship between the seller making the discriminations and another or between the local purchaser and the interstate purchasers or between the local sales and the interstate sales, is irrelevant to the present case. Here no sales to anyone crossed state lines.

B. THERE WAS NO JURISDICTION OF THE CLAIM UNDER SECTION 3 OF THE CLAYTON ACT

With respect to the Section 3 claim, which is that Industrial sold asphaltic concrete on condition that the buyer not purchase the product from respondents, the only relevant facts are that Industrial's sales were entirely in California, and any sales by Copp of asphaltic concrete would have also to be in California.

Citing *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), Copp asks, rhetorically, how it can be supposed that Congress intended employees producing material for use in roads to be subject to minimum wage protection but that sellers of the product were not to be covered by Section 3 of the Clayton Act (Resp. Br. 33). The answer is simple: Congress expressed its wishes in quite different language in the two statutes. It chose to lay down different tests for application of the two Acts (all as shown at length in our Opening Brief at pp. 20, et seq.). The innumerable contending economic and social considerations pressing upon Congress for attention were different with respect to the two bodies of regulation, and Congress made its choice among them differently.

The basic vice in Copp's argument lies in overlooking the fact that Section 3 of the Clayton Act not only requires an *effect* on interstate commerce but also requires that the seller be "in commerce", that the tying practice be "in the course of that commerce," and that these requirements come first. Therefore Section 3 is "narrower" than the Sherman Act, the characterization given by the Court in *Standard Oil Company of California, et al. v. United States*, 337 U.S. 293 (1949) (at p. 297), where it also describes Section 3 as "narrowly directed" (p. 312). Citing the *Standard* case Copp in sweeping error says (Resp. Br. 29, 30): "Petitioner, anticipating respondents' reference to Standard Oil Co. & Standard Stations, Inc., supra, do not seriously dispute the fact that the [Standard] decision stands for the proposition that the commerce test for a Section 3 violation is met by practices in commercial activities which may 'affect' interstate commerce. They argue only that no such affect [sic] is possible here because interstate asphaltic concrete sales are not shown." The case does not stand for any such proposition. The fact that Standard *was* "in commerce", that it made numerous sales "in commerce", and that its imposition of exclusive dealing contracts was "in the course of such commerce" was a given datum and the starting point of the decision. Standard's argument was that the next requirement of the Act was absent, that because most of its sales were not interstate there was no substantial effect on interstate commerce, a further requirement of the Act. Thus the Court noted (at p. 297):

> "Obviously the contracts here at issue would be proscribed if § 3 stopped short of the qualifying clause beginning, 'where the effect of such lease, sale, or contract for sale' ".

The only issue presented in the case was that of "effect". In the present case, one never reaches the question of effect, because the hurdle of the first requirement, that the seller, the sales, and

the alleged tying arrangement must be "in commerce", must be cleared, and it is not.

This failure to observe that, while Section 3 does require an "effect" on interstate commerce, its first requirement is that the offender and the offense be "in commerce * * * in the course of such commerce", crops up in another argument. Copp asserts that a purpose of Section 3 of the Clayton Act, like Section 7, is to reach antitrust competitive restraints "in their incipiency" (Resp. Br. 21). From this premise Copp draws the *non-sequitur* that Section 3 has the same jurisdictional reach as the Sherman Act. The "incipiency" standard relates to "effect". The Sherman Act aims at effects on interstate commerce that are *actual, present, existing* and *adverse*. It was natural and understandable for Congress to exercise its full constitutional power to root out that kind of effect—one present and actual—however and by whomever worked, since the prohibitions are curative of a present evil. But the "incipiency" statutes relate, not to present actualities, but to prognostications about probabilities of the future; they are not curative of present evil but forestalling. It was entirely natural for Congress, and understandable, to conclude that regulation like that should operate only where the supposed offender and offense are "in commerce" itself.

The statutes plainly draw the distinction, they are differently worded, there is good reason for the difference, and there is no basis for courts to rewrite the statutes in order to ignore the difference.

C. THERE WAS NO JURISDICTION OF THE CLAIM UNDER THE CELLER-KEFAUVER ACT (CLAYTON ACT, § 7)

The plants of Sully-Miller, the acquired corporation, are entirely in California.[10] It sells no asphaltic concrete to anyone outside of California and operates only in California.

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10. Copp phrases the matter as "principally in Southern California" (Resp. Br. 26), thus leaving at odds the location of the others. They are all in Southern California, as is correctly stated at Resp. Br. 4. Copp's

Section 7 requires that the acquired corporation be "in commerce". To bring Sully-Miller within this requirement, Copp advances the two different lines of reasoning noted at the outset of this brief, but it flees from each for protection in the arms of the other. It begins and ends with a bare assertion, without argument, that the mere fact of highways placed Sully-Miller "in commerce" (Resp. Br. 26, 31), but the 5 pages in between are devoted to urging the second line of reasoning. Then, after devoting the bulk of its discussion to arguing that the words "engaged in commerce" mean no more than "engaged in activities affecting commerce", Copp retreats, saying that this conclusion "is not necessary for the purposes of the decision in this case" (Resp. Br. 31). If not, what less does Copp contend will suffice? Its very next paragraph asserts that " 'Commerce among the several states' means, constitutionally, activities in commerce or which affect commerce." Either that merely reasserts what Copp had just said was not necessary for its case, or else it means only that Congress has the constitutional power to regulate activities affecting commerce. If the latter is what is meant, the statement is true but irrelevant. The language of the Constitution is that Congress has the power "to *regulate* commerce with foreign Nations and among the several States and with the Indian Tribes" (Art. I, Sec. 8, Cl. 3). The term by which Congress chose to demark the extent of its regulation in Section 7 is "in commerce". And so, once again, the question is not what Congress could do but what it did do.

To support its primary contention that Section 7 is to be interpreted as requiring no more than an effect on commerce, Copp advances the same "incipiency" argument made concerning Section

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statement at Resp. Br. 4 that the asphaltic concrete manufactured by Sully-Miller is from asphalt produced "substantially" from interstate and foreign crude oil is shown, at p. 9, fn. 6, *supra*, to be both irrelevant and without support in the record.

3. Our discussion at p. 17, *supra*, answers the argument. Copp then (Resp. Br. 28) quotes from *Transamerica v. Board of Governors*, 206 F.2d 163, 166 (3 Cir. 1953). In our opening brief (at p. 38) we noted that the quotation, read in context, did not conceivably mean that Section 7's requirement that the acquired corporation be "in commerce" was to be ignored or to be interpreted as meaning "affecting commerce". In the *Transamerica* case the court made the quoted utterance in connection with rejecting an argument that the words "corporations engaged in commerce" did not include banks. Section 7 speaks comprehensively of "corporations engaged in commerce"; banking corporations are engaged in commerce, and therefore the natural meaning of the section includes banks.

Copp then poses a supposititious case, that someone acquires 100% of the manufacture and supply of asphaltic concrete and highway asphalt contracting. It would be, Copp proclaims, "a ludicrous defense to a Sherman Act proceeding, on those facts, to assert that asphaltic concrete does not move between states and therefore monopoly powers over these interstate activities is not within the Sherman Act" (Resp. Br. 30). However ludicrous such an assertion might be, the supposititious situation is not relevant. The statute under consideration here is *not* the Sherman Act, which requires no more for jurisdiction than the designated effect on commerce.

The requirements of Section 7 are both more and less stringent than those of the Sherman Act. Under Section 7 the "effect" need not be as stringent—for it need only be incipient rather than actual—but Section 7 does not apply at all unless both acquired and acquiring corporations are "in commerce". The leniency of Section 7 with respect to "effect" is matched by its rigor with respect to when Section 7 applies. Congress was not unmindful that it was not going as far as it constitutionally could. For example,

when Section 7 was enacted in 1914 (38 Stat. 731), it permitted *effect* to be measured "in any * * * community." In 1950, at the time the Celler-Kefauver amendments were introduced, that language was again proposed, but it was rejected for reasons stated in Senate Report No. 1775, 81st Congress, 2d Sess. (1950), p. 4, as follows:

> "As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened '* * * in any community * * *' of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise from buying up another local enterprise in the same town. As a consequence, the word 'community' was dropped from subsequent versions of the bill."

CONCLUSION

Numerous social, economic and political considerations contest with each other for the attention of Congress when it considers what legislation to enact and whether to exercise the full range of its powers. Congress has a choice of apt terms to express how far it chooses to go in regulating commerce in response to these contending claims. In the Robinson-Patman and Clayton Acts it has chosen its terms with circumspection. Courts should not expand them.

The court below erred in its decision of each of the matters on which the writ was granted. We respectfully submit that its judgment should be reversed and that of the district court reinstated on these matters.

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Respectfully submitted,

MOSES LASKY
RICHARD HAAS
Attorneys for Petitioner Union Oil Company of California

GEORGE A. CUMMING, JR.
BROBECK, PHLEGER & HARRISON
Of counsel for Petitioner Union Oil Company of California

RICHARD W. CURTIS
Attorney for Petitioner Industrial Asphalt, Inc.